PINSIA DEVELOPMENT SDN BHD & ORS

v.

HJ ABDUL HADI AHMAD & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ARIFIN JAKA JCA
AUGUSTINE PAUL JCA
[CIVIL APPEAL NO: K-02-278-2002]
1 DECEMBER 2004

CONTRACT: *Construction - Conduct - Contemporaneous conduct of parties subsequent to making of contract (option to purchase) - Whether conduct may be used by court to interpret contract - Whether conduct of parties can confer a particular meaning to a contractual term - Specific performance ordered in terms of draft sale and purchase agreement*

This appeal concerned the construction to be placed on a clause ('cl. 2') in an option to purchase ('the option') granted by the intended vendors ('the vendors') of some immovable property to the intended purchasers ('the purchasers'). The questions that fell for determination before the justices of appeal herein were whether the option was properly exercised and whether there was a concluded sale and purchase agreement between the parties. Clause 2 of the option read, "The Intended Purchasers hereby agree to enter with a Sale and Purchase Agreement within 45 days of the date hereof and to pay the balance sum amounting to a total of 10% of the total purchase price if they decide to exercise the option to purchase the above-mentioned properties". As it transpired, the purchasers did not pay the balance of the 10% deposit ('the balance-deposit') within the said 45 days but they did submit a standard draft sale and purchase agreement to the vendors' solicitors within that period. It was the purchasers' contention that the balance-deposit need only be paid to the vendors at the time of the execution of the sale and purchase agreement. From their contemporaneous correspondence, the vendors also did not appear to have had any objections to the non-payment of the balance-deposit within the 45 days or to the terms of the purchasers' draft sale and purchase agreement.

Held (allowing the purchasers' appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] Although an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto, yet the parties may, by their subsequent conduct, give a particular meaning to a term of the agreement. In the present case, it would appear that the parties had, by their contemporaneous conduct subsequent to the option, interpreted cl. 2 thereof to mean that the balance-deposit need **not** be paid within the said 45 days. Indeed, that was the meaning of cl. 2 by which the court was bound. The learned judge was thus **not** entitled to discover some other meaning in the exercise of his interpretative jurisdiction. It therefore followed that there was a concluded and binding sale and purchase agreement between the parties in the terms of the draft sale and purchase agreement submitted by the purchasers' solicitors to the vendors' solicitors. (pp 419 f-h & 420 a-c)

[Orders of High Court set aside; specific performance decreed in terms of purchasers' draft sale and purchase agreement.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Rayuan ini berkait dengan pentafsiran yang harus diberi kepada satu perenggan ('peranggan 2') dalam suatu opsyen membeli ('opsyen') yang diberikan bakal-bakal penjual beberapa hartanah tak alih ('penjual') kepada bakal-bakal pembeli hartanah tersebut ('pembeli'). Persoalan yang berbangkit untuk keputusan yang arif hakim-hakim rayuan adalah sama ada opsyen telah dilaksanakan dengan sempurnanya dan sama ada suatu perjanjian jual beli telah wujud di antara pihak-pihak. Perenggan 2 opsyen berbunyi, "Bakal-bakal pembeli dengan ini bersetuju untuk memeterai suatu Perjanjian Jual Beli dalam tempoh 45 hari dari tarikh di sini dan membayar jumlah baki sekadar 10% harga penuh pembelian jika mereka memutuskan untuk melaksana opsyen membeli hartanah yang tersebut diatas". Seperti yang berlaku, pembeli tidak membayar baki 10% deposit ('baki-deposit') dalam masa 45 hari, tetapi telah mengemukakan draf biasa perjanjian jual beli kepada peguam penjual dalam tempoh tersebut. Pembeli bagaimanapun berhujah bahawa baki-deposit hanya perlu dibayar kepada pembeli ketika perjanjian jual beli dimeterai. Berdasarkan surat menyurat kontemporari mereka, penjual nampaknya tidak membantah kepada kegagalan pembeli membayar baki-deposit dalam tempoh 45 hari tersebut, atau kepada mana-mana terma draf perjanjian jual beli yang dikemukakan oleh pembeli.

Diputuskan (membenarkan rayuan pembeli)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Walaupun perjanjian mungkin tidak perlu ditafsir dengan merujuk kepada kelakuan terkemudian pihak-pihak, namun, pihak-pihak boleh, melalui kelakuan terkemudian mereka, memberi maksud tertentu kepada terma perjanjian. Dalam kes semasa, pihak-pihak, melalui tindak tanduk kontemporari mereka pasca opsyen, nampaknya telah mentafsir perenggan 2 sebagai bermaksud bahawa baki-deposit tidak perlu dibayar dalam tempoh 45 hari. Malah, itulah maksud perenggan 2 yang mengikat mahkamah. Yang arif hakim dengan itu tidak berhak untuk membuat penemuan tentang apa-apa maksud lain semasa melaksanakan bidang kuasa pentafsirannya. Ianya dengan itu mengikut bahawa telah wujud suatu perjanjian jual beli yang muktamad di antara pihak-pihak berdasarkan terma draf perjanjian jual beli yang dikemukakan oleh peguam pembeli kepada peguam penjual.

Perintah Mahkamah Tinggi diketepikan; pelaksanaan spesifik diperintah berdasarkan terma draf perjanjian jual beli pembeli]

Case(s) referred to:
Amalgamated Investment & Property Co Ltd (In liquidation) v. Texas Commerce Bank [1982] QB 84 ***(refd)***
American Surety Co of New York v. Calgary Mining Co Ltd [1919] 48 DLR 295 ***(foll)***
Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***
Wickman Tools v. Schuler AG [1974] AC 235 ***(refd)***

For the appellants - Chuah Chong Ewe; M/s Sykt Ng & Anuar
For the respondents - R Balabedna; M/s Balabedna & Co

[Appeal from High Court, ALor Setar; Civil Suit No: 22-62-1996]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:

We heard this appeal yesterday and at the conclusion of arguments reserved judgment to today. This case concerns the construction to be placed on a clause in an option (exh. P2) granted by the intended vendor of certain immovable property to the intended purchaser. The questions of immediate moment are whether the option was properly exercised and whether there is a concluded agreement between the parties to this appeal. The clause in question (cl. 2) reads as follows:

2. The Intended Purchasers hereby agree to enter with a Sale and Purchase Agreement within 45 days of date hereof and to pay the balance sum amounting to a total of 10% of the total purchase price if they decide to exercise the option to purchase the abovementioned properties.

It is the appellants' case that the aforesaid clause on its true construction means that the sale and purchase agreement contemplated by the clause must be executed and the balance of the 10% deposit referred to therein be paid at the time of such execution. There is no dispute that the balance of the 10% was not paid within the 45 days specified in cl. 2. However, according to the chronology of events we were taken through, it is equally beyond challenge that the appellants did, within the 45 days specified in the option, forward to the respondents' solicitors a draft agreement containing terms that may be found in any normal sale and purchase agreement in Malaysian conveyancing practice.

It is also a point of considerable significance that at no time throughout the material period when the parties were in communication with each other did the respondents reject the transaction out of hand on the ground that the appellants had not paid the balance of the 10% deposit within the 45 days limited by cl. 2. Instead, we find in the record of appeal provided to us a letter from the respondents' solicitors dated 12 July 1993 in which they say that they have no objections to the terms of the draft agreement prepared by the appellants' solicitors and sent by them under cover of their letter dated 17 April 1993. Now, this was well outside the 45 day period specified in cl. 2. That period expired on 23 February 1993.

We therefore have here a situation whereby the parties have by their contemporaneous conduct subsequent to the making of the option agreement placed an interpretation on cl. 2 of exh. P 2 to the effect that payment of the balance of the 10% was not to be made within the 45 days prescribed by that clause. Is it then open to a court to place a different interpretation on cl. 2? With respect, we think not.

We accept that it is settled law that an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto (see *Wickman Tools v. Schuler A.G.* [1974] AC 235). But it is equally well settled that parties may by their subsequent conduct give a term in an agreement a particular meaning. See, *American Surety Co of New York v. Calgary Mining Co Ltd* [1919] 48 DLR 295, a decision of the Privy Council. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other

meaning in the exercise of its interpretive jurisdiction. See *Amalgamated Investment & Property Co Ltd (In liquidation) v. Texas Commerce Bank* [1982] QB 84; *Boustead Trading (1985) Sdn Bhd v. Arab Malaysia Merchant Bank Bhd* [1995] 4 CLJ 283.

In our respectful view, this is the error into which the learned judge in the court below fell. Instead of hearkening to the way in which the parties themselves acted towards each other in relation to the meaning of cl. 2, he erred in accepting the invitation of the defendants' (respondents before us) counsel to place a different interpretation on the said clause. It follows from what we have said thus far that there was a concluded and binding agreement between the parties in terms of the draft agreement sent under cover of the appellants' solicitors' letter dated 17 April 1993. This is accordingly a case which demands appellate interference.

For the reasons already given this appeal succeeds and is accordingly allowed. The orders of the High Court are set aside. Specific performance in terms of the draft agreement enclosed with the appellants' solicitors' letter dated 17 April 1993 is hereby decreed. The matter is remitted to the senior assistant registrar of the High Court to enable the parties to settle the terms of the minutes of the order that is to carry into execution the decree hereby granted. The appellants shall have the costs of this appeal and those incurred in the court below. The deposit is refunded to the appellant.